Supreme Court, U.S.
FILED

971421 MAR 0 2 1998

OFFICE OF THE CLERK

No. 97-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

DANIEL T. WORLEY,
Petitioner,
v.
PENNSYLVANIA PUBLIC SCHOOL EMPLOYEE'S RETIREMENT BOARD,
Respondent

Petition for Writ of Certiorari
To the Commonwealth Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

FRANCIS WORLEY
Counsel of Record
National Interreligious
Service Board for
Conscientious Objectors
1830 Connecticut Ave. NW
Washington, DC 20009

(202)-483-2220

Attorney for Petitioner

March 1998

10 pp

QUESTIONS PRESENTED

(1) In light of this Court's decisions in *Sherbert*, *Smith* and *City of Boerne*, what standard of scrutiny should now be applied to state laws that penalize the exercise of religious beliefs?

(2) Is conscientious objection an implicit fundamental constitutional liberty for the purpose of Equal Protection analysis?

(3) Is the application of *the Smith* standard to non-criminal statutes a violation of the International Covenant on Civil and Political Rights?

List of All Parties

The caption of the case in this Court contains the names of all parties (Daniel T. Worley and the Pennsylvania Public School Employee's Retirement Board).

TABLE OF CONTENTS

Questions Presented i
List of All Parties i
Index to Appendices iii
Table of Authorities iii

PETITION

OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES AND RULES INVOLVED 2
STATEMENT OF THE CASE 4

REASONS FOR GRANTING WRIT

1- THE DECISION BELOW IS CONTRARY TO THIS COURT'S STANDARD PROTECTING THE FREE EXERCISE OF RELIGION..... 9

2- THE STATE COURT BELOW FAILED TO ADDRESS WHETHER WORLEY ENJOYS A CONSTITUTIONAL RIGHT TO CONSCIENTIOUS OBJECTION, AND THUS ERRONEOUSLY DISMISSED HIS EQUAL PROTECTION CLAIM. 17

3- THE STATE HAS NO SUFFICIENT INTEREST THAT PREVENTS IT FROM GRANTING WORLEY AND OTHER MEMBERS OF HIS CLASS PUBLIC BENEFITS..... 26

CONCLUSION.....30

Index to Appendices

A. Opinion of the Commonwealth Court of Pennsylvania A1

B. Order of Supreme Court of Pennsylvania denying consideration B1

C. Order of Supreme Court of Pennsylvania denying reconsideration C1

D. Brief for Appellant before Commonwealth Court of Pennsylvania D1

Table of Authorities

Cases

Attorney General of New York v. Soto-Lopez et al,

476 U.S. 898 (1986).....25

Bowen v. Roy

476 U.S. 693 (1986).....19

Brickhouse v. Spring-Ford Area School District,

656 A.2d 483 (1994).....29

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah

508 U.S. 520 (1993) 11,18

City of Boerne v. Flores,

117 S.Ct. 762, 136 L.Ed.2d 709 ...10

Clark v. Allen,

331 U.S. 503 (1947) 15

Cleveland v. United States,

329 U.S. 14 (1946) 23

Crabtree v. Montana State Library,
204 Mon. 398 (1983).....29
Dunn v. Blumstein,
405 U.S. 330 (1972).....25
Employment Division, Oregon Department of Human Resources v. Smith,
494 U.S. 872 (1990).....10,11,13
Fleming v. Montana State University,
220 Mont. 133 (1986) 29
Gillette v. United States.,
401 U.S. 437 (1971).....18,21,22
Girouard v. United States,
328 U.S. 61(1946) 23
Hobbie v. Unemployment Appeals Comm'n of Fla.,
480 U.S. 136 (1987) 10
Hooper et al v. Bernalillo County Assessor,
472 U.S. 612 (1985) 25
Johnson v. Robison,
415 U.S. 361 (1974).....4,26,28
Missouri v. Holland,
252 U.S. 416 (1920) 15
Morris v. Commonwealth, Pub. School Employee's Retirement System,
14 Pa. Cmwlth.369 (1988) 13,27
Nebraska v. Shonkwiler,
187 Neb. 747 (1972) 23

Nick v. Montana Dept. of Highways,
219 Mont. 168 (1985).....29
Personnel Administrator of Massachusetts et al v. Feeney,
442 U.S. 256 (1979) 29
Plyler v. Doe,
457 U.S. 202 (1982) 18
Prince v. Massachusetts,
321 U.S. 158 (1944) 23
Reynolds v. United States,
98 U.S. 145 (1878).....23
San Antonio Ind. School Distr. v. Rodriguez,
411 U.S. 1 (1973) 17,18,21
Sherbert v. Verner,
374 U.S. 398 (1963)....9,10,12,16,17
Thomas v. Review Bd., Indiana Employment Security Div. et al,
450 U.S. 707 (1981).....10,12
Wisconsin v. Yoder,
406 U.S. 205 (1972) 23
Worley v. Pennsylvania Public School Employees' Retirement Board,
689 A.2d 334 (1997) 1,8,10,26,27
Zscherning v. Miller,
389 U.S. 429 (1968).....15

Statutes, Regulations and Treaties

32 CFR § 1636.3 and 1636.4 19

DOD Directive 1300.6 21

General Comment 22, Article 18, U.N. Doc. HRI/GEN/1/Rev.1 (1994) 24

International Covenant on Civil and Political Rights 138 Cong. Rec. S 4781 (26 March 1992) 14,15,16,24

Restatement (Third) of the Foreign Relations Law of the United States, Section 115 (1987) 15

U.N.Doc. E/CN.4/1993/122 25

U.N. Doc.A/51/542, General Assembly, Fifty-First Session, Agenda Item 110 (b) (1996) 24

United States Constitutional Provisions.2

24 Pa.C.S. § 8304 3

28 U.S.C. § 1257(a) 2

50 U.S.C. App. § 456 (j).....5

Miscellaneous

1. Brown, Kohn and Kohn, Conscientious Objection: A Constitutional Right, New England Law Review, Vol. 21, No.3 (1985-86) 21

2. W. Cole Durham, Jr., Perspectives on

Religious Liberty: A Comparative Framework, in Religious Liberty: Religious Human Rights in Global Perspective: Legal Perspectives, van der Vyver and Witte, eds., Martinus Nijhoff (1996) 17

3. Newman and Weissbrodt, International Human Rights: Law, Policy and Process, Second Edition, Anderson Publishing (1996) 15

4. Bertrand Fry, Note: Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence, 71 Tex. L. Rev. 833.....11

5. Michael S. Satow, *Conscientious Objectors: Their Status, the Law and its Development*, 3 Geo. Mason u. Civ. Rts. 113 (1992).....22

6. Michael P. Seng, Conscientious Objection: Will the United States Accommodate those Who Reject Violence as a Means of Dispute Resolution?, 23 Seton Hall L. Rev. 121 (1992).....22

PETITION FOR WRIT OF CERTIORARI -

TO THE SUPREME COURT OF

THE STATE OF PENNSYLVANIA

DANIEL T. WORLEY petitions this Court for a Writ of Certiorari to review the judgement and decision of the Pennsylvania Commonwealth Court affirming the decision of the Pennsylvania Public School Employees' Retirement Board.

OPINIONS BELOW

The opinion of the Commonwealth Court of Pennsylvania, decided on 31 January 1997, can be found at 689 A.2d 334. A copy of the opinion is included in the Appendix to this petition. A copy of the decision of the Supreme Court of Pennsylvania denying Petitioner Worley's request for hearing and his denial of re-consideration are also included in the Appendix.

JURISDICTION

The Appeals Committee of the Public School Employees' Retirement System of Pennsylvania denied the petitioner's request by letter dated 14 November 1994. At the administrative hearing on 29 June 1995 the hearing examiner denied the petitioner's request. The petitioner filed exceptions to the hearing examiner's decision. The board denied the petitioner's request. The Commonwealth Court of Pennsylvania affirmed the decision of the board on 31 January 1997. Petitioner submitted a petition for review

on appeal to the Supreme Court of Pennsylvania, which was denied on 17 October 1997. A Petition for Reconsideration from the Order of the Commonwealth Court to the Supreme Court of Pennsylvania was denied on December 2, 1997. The jurisdiction of this court is invoked under 28 U.S.C. §1257 (a).

Constitutional Provisions, Statutes and Treaties Involved

The First Amendment of the Constitution of the United States, provides, in part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

The Fourteenth Amendment of the Constitution of the United States provides, in part:

Section 1. No state shall ... deny to any person within its jurisdiction the equal protection of the laws.

Article VI, cl. 2, of the Constitution of the United States, provides:

... all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article 18 of the International Covenant on Civil and Political Rights, provides, in part:

1. Everyone shall have the right to

freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Pennsylvania's "Retirement Code" 24 Pa.C.S. § 8304 (A) permits "An active member ... of the State Employees' Retirement System shall be eligible to receive Class T-C service credit for creditable non-school service as set forth in subsection (B)...."

Section 8304(B, LIMITATIONS ON NON-SCHOOL SERVICE, provides as follows:

(B)(2)Military service other than intervening military service and activated military service not exceeding five years provided that a member with multiple service may not purchase more than a total of five years of military service in both the system and the State Employees' Retirement System."

Section 8102 of the Retirement Code defines military service as "[a]ll active military service for which a member has

received a discharge other than an undesirable, bad conduct or dishonorable discharge."

STATEMENT OF THE CASE

This petition presents issues that arose from proceedings before the Pennsylvania Public School Employees' Retirement System. The petitioner challenged his inability to purchase retirement credits due to his failure to have performed military service, as defined in section 8102 of the Retirement Code.

This Court decided a factually similar case in 1974. In *Johnson, Administrator of Veteran's Affairs, et. al. v. Robison*, 415 U.S. 361 (1974), this Court held that conscientious objectors who performed alternative service were not entitled to educational benefits under the federal Veteran's Readjustment Act of 1966, and that such denial did not violate petitioner's constitutional rights of Free Exercise of Religion and Due Process.

The present case poses substantially different questions which warrant the Court's review. First, the case involves a state law providing public benefits entirely unrelated to the issue of veterans readjustment, and only vaguely related to any legitimate state interest. Second, the state law in its application discriminates against a distinct class of conscientious objectors on the basis of whether or not they performed non-combatant military service. Third, such

classification draws its line along established religious grounds. Lastly, relevant international law now recognizes conscientious objection as a universal human right and prohibits discrimination against conscientious objectors who perform alternative service in lieu of military service.

a. Procedural History

Federal Questions Raised

The federal questions of Equal Protection and Free Exercise of Religion were first raised at the hearing of 29 June 1995. *689 A.2d 334, at 334, App. A1.* These issues again were raised before the Commonwealth Court:

> ... and [t]he First Amendment of the Bill of Rights in the United States Constitution all deal with freedom of religion with respect to bearing arms. *See Brief for Appellant*, App. D4.

The Commonwealth Court did not directly address the Free Exercise clause of the U.S. Constitution, but relied on an understanding of Article I, section 3 of the Pennsylvania Constitution. *689 A.2d at 340. App. A21.*

> Worley contends that the board erred in finding no violation of Art. I, section 3, because the board's decision deliberately discriminates against a class of citizens who lawfully pursue a religious scruple against war. We Disagree. *Id.*

Worley raised the Equal Protection claim in his appellate brief.

> There is also a lack of equal protection of the law if Daniel T. Worley cannot buy his alternative service time like others can in the armed military. *See Brief for Appellant*, App. D4.

The court below dismissed petitioner Worley's Equal Protection claim as unfounded.

> Accordingly, we reject Worley's contention that section 8304 (b) of the Retirement Code violates the Fourteenth Amendment of the United States Constitution. *689 A.2d at 339. App.A22.*

On November 3, 1994, Daniel Worley appeared before the appeals committee of the Public School Employee's Retirement Board and requested that he be allowed to purchase military retirement credit for the two years in which he performed alternative service in fulfillment of the legal requirements set forth in 50 U.S.C. App. § 456(j).

By letter dated November 14, 1994, the appeals committee denied Worley's request to purchase military service credit on the basis that alternative service did not meet the statutory definition of military service as established in the Retirement Code. Worley subsequently requested an administrative hearing which was held on 29 June 1995.

The hearing examiner thereafter issued a decision and order recommending that Worley be denied the opportunity to purchase

retirement credits based on alternative service performed in lieu of military service.

Worley then filed exceptions to the hearing examiner's decision and order. The Board determined that petitioner's exceptions were without merit and that the class of alternative service performed by Worley did not constitute military service as defined in section 8102 the Retirement Code.

(b) The Appeal

Worley appealed to the Commonwealth Court of Pennsylvania, arguing that alternative service, performed pursuant to the Military Selective Service Act, should be so construed as to meet the definition of military service as provided in section 8102 of the Retirement Code. The Commonwealth Court of Pennsylvania, No. 2009 C.D. 1996, J. Kelley presiding, found petitioner's arguments to be without merit and therefore affirmed the Board's decision.

The Pennsylvania Supreme Court denied Worley's petition on 17 October 1997. A Petition for Reconsideration of the refusal to allow an appeal from the Order of the Commonwealth Court filed by Worley was denied by the Pennsylvania Supreme Court on December 2, 1997. This petition is filed timely on 2 March 1998.

(c) Statement of Facts

Worley registered with the Selective Service System, and in 1968 requested classification as a Class I-0 conscientious

objector. Worley was notified by letter dating 19 November 1968 that his request had been approved.

By notice of letter dated 20 February 1969, Worley was ordered to report for an Armed Forces Physical Examination. Worley complied with the order, and was found fit for the performance of military and alternative service. A Class I-O conscientious objector, Worley was required to perform an alternative service consisting of "civilian work contributing to the maintenance of the national health, safety or interest." 50 U.S.C. App. § 456(j).

Worley was provided with a list of acceptable alternative service placements and chose to perform his two years of service with the Jefferson Medical Center in Philadelphia, where he worked with the criminally insane from 1 July 1969 to 2 July 1971. Worley was released from the performance of alternative service effective 30 June 1971, based on his successful fulfilment of this legal obligation.

Worley became an employee of the Northern York School District of Pennsylvania and a member of the Public School Employee's Retirement System of Pennsylvania on 26 October 1973. On 3 November 1994, Worley attempted to purchase military retirement credits for the two years in which he performed alternative service.

REASONS FOR GRANTING THE WRIT

(1) THE DECISION BELOW IS CONTRARY TO THIS COURT'S STANDARD PROTECTING THE FREE EXERCISE OF RELIGION.

The decision of the Pennsylvania Commonwealth Court upholds a state statute that penalizes petitioner Worley for exercising a federally-protected right, conscientious objection to military service, designed to ensure his free exercise of religion. The decision below is therefore contrary to this Court's precedent.

The court below stated that the statute "neither explicitly or implicitly prohibits Worley in any manner from worshiping as he chooses or from enjoying freedom of conscience. To now argue that it is an infringement on such constitutional rights to deny him service credit which accrues only for military service is nonsensical." *Worley v. Pennsylvania Public School Employees' Retirement Board*, 689 A.2d 334, 340. (Pa. Commw. 1997) App. A1.

In this case, however, the issue is whether it is constitutional for Pennsylvania to penalize him—by denying him available public benefits—for having complied with both his religious beliefs and the federal conscription law in 1968.

The suggestion of the court below that Worley's contention is "nonsensical" highlights both a lack of rigor in the court's analysis, and a lack of attention to this Court's holdings in *Sherbert v. Verner*,

374 U.S. 398 (1963), and since then in *Thomas v. Review Bd. et al*, 450 U.S. 707(1981), and *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) which state very clearly that "[a] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." 450 U.S. at 716-718.

The Free Exercise claim raised by Worley is especially valid when considering that he was conscripted by the federal government. Worley was required by law to choose among three options: (1) prison, (2) military service, and (3) an approved alternative service. Worley performed alternative service, not because he chose to, but because he was compelled to do so by federal law and by his religious beliefs.

A) The Smith Standard

Petitioner should prevail on his Free Exercise claim under the standard of *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990), just as he prevails under *Sherbert* and *Thomas*.[1] *Smith* established that neutral criminal laws of general applicability that have the incidental effect of burdening religious practices need not be justified by a compelling governmental interest. 494 U.S. at

---

[1] *See generally City of Boerne v. Flores*, 117 S.Ct. 762, 136 L.Ed.2d 709

879.

This case is distinguishable from *Smith*. Worley seeks public retirement benefits. The petitioners in *Smith* sought exemption from a facially neutral and generally applicable criminal statute.

In *Smith*, this Court reiterated that *Sherbert* offers no protection in cases involving neutral, generally applicable criminal statutes that have the effect of incidentally burdening the free exercise of religious beliefs. 494 U.S. at 884. Worley involves neither criminal statutes nor criminal behavior.

In *Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)*, the Court struck down a city ordinance criminalizing religious conduct because it failed the neutrality and general applicability requirements of *Smith*. However, this Court has not articulated whether *Smith*'s test applies, or should be applied, to public benefits programs such as the one in this case.[2] Arguably, *Smith* removes only neutral and generally applicable criminal statutes from heightened constitutional analysis.

---

[2] The Second, Third, and Sixth Circuits have concluded that Smith applies to civil as well as criminal statutes. Bertrand Fry, *Note: Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 Tex. L. Rev. 833 (1993).

Even under the regime of *Smith*, non-criminal statutes that involve public benefits–where they place incidental burdens on religious exercise–may trigger heightened scrutiny.

(b) The Sherbert Test

This Court in *Sherbert* reaffirmed the long-standing principle that

> conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. 374 U.S. at 405.

And this principle has remained an integral component of this Court's subsequent jurisprudence. In *Thomas:*

> [a] person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program. *Thomas*, 450 U.S. at 716-718.

The appropriate standard of review in this case is that articulated in *Sherbert*, in which this Court held that a substantial burden on the free exercise of religion can only be justified by a compelling state interest employing the least restrictive means. Sherbert, 374 U.S. at 404-406 (1963).

The court below, in denying Petitioner Worley's request for relief, relied on its own precedent, in which the court found the same statute neutral and generally

applicable. *Morris v. Commonwealth, Pub. School Employee's Retirement System, 14 Pa.Cmwlth. 369 (1988).*

Morris, however, involved a military veteran who sought state benefits while at the same time was eligible for federal benefits for his military service. The simultaneous receipt of federal and state benefits for military service is prohibited by 24 Pa.C.S. § 8304. There was no Free Exercise claim, nor any other claim of fundamental rights.

Worley did make a Free Exercise claim that involved public benefits—not a criminal statute—which are conditioned by the state upon acts proscribed by his religious beliefs. In the absence of a criminal statute, the applicability of *Smith* to the instant case is questionable. The Court has clearly stated:

> "[e]ven if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." (emphasis added) 494 U.S. at 884-885 (1990).

Applying *Sherbert* in the instant case would not require the Court to abandon this position.

(C) "Hybrid" Cases Requiring Heightened Scrutiny

In *Smith*, this Court maintained that

heightened scrutiny is appropriate in those "hybrid" cases involving the Free Exercise Clause together with other constitutional protections. *Employment Division v. Smith*, 494 U.S. at 881.

Worley contends that his constitutional right to free exercise of religion is inextricably linked to his Equal Protection claim, thus rising to the hybrid standard articulated in *Smith*. The court below, however, did not mention or employ such analysis.

(D) International Legal Standards

International law governing the protection of religious freedom requires that the *Sherbert* balancing test be applied to non-criminal statutes. The United States Senate gave its advice and consent to the International Covenant on Civil and Political Rights (ICCPR) in 1992. *138 Cong. Rec. S 4781 (26 March 1992)*. The treaty was ratified by President George Bush on 8 June 1992.[3] No reservations or declarations to the treaty were entered in regard to Article 18, Freedom of Thought, Conscience and Religion.

The ICCPR does not create a separate cause of action, as it was declared non-self

---

[3] White House Statement on the Signing of the International Covenant on Civil and Political Rights, 28 Weekly Comp. Pres. Doc. 1008 (June 5, 1992).

executing.[4] As applied to the states, a non-self executing treaty is nevertheless a law superseding state law or policy.[5] This Court has held that where state and treaty laws conflict, the treaty controls.[6] *Zscherning v. Miller,* 389 U.S. 429, 440-41(1968), *Clark v. Allen,* 331 U.S. 503, 508 (1947), *Missouri v. Holland,* 252 U.S. 416, 433-34 (1920).

Article 18 of the ICCPR establishes clear guidelines for the protection of religious freedom. *G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.* Article 18 states, in pertinent part,

> (1) Everyone shall have the right to freedom of thought, conscience and religion.
>
> (3) Freedom to manifest one's religion

---

[4] The status of the Covenant as non-self-executing does not change its authority in domestic law. "Even though the covenant is non-self-executing, these will now become binding international obligations of the United States." 138 Cong. Rec. S 4781.

[5] Restatement (Third) of the Foreign Relations Law of the United States, Section 115 (1987).

[6] See generally, Newman and Weissbrodt, *International Human Rights: Law, Policy and Process,* Second Edition, Anderson Publishing (1996).

or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, health, morals or the fundamental rights and freedoms of others.

International standards for the interpretation of treaties establish that proposed limitations on manifestations of religious freedom must be the least restrictive means available to achieve such protections.[7]

This Court's *Sherbert* test thus closely approximates the international standard. Both (1) recognize that manifestations of religious beliefs may be injurious to self and others and require limitation (criminal sanctions), (2) give greater deference to the religious practices of individuals rather than the requirements of the State, and (3) require that the least restrictive means available be employed to achieve necessary protections, so as not to vitiate the right itself.

The ICCPR, as does the U.S. Constitution, recognizes a non-limitable and non-derogable right to hold religious beliefs of an individual's choice. While the exercise of religion may be limited, the State bears the burden in meeting the strict requirements established by Article 18(3), *supra*.

---

[7] *The Siracusa Principles*, U.N. Docs. E/CN.4/1985/4.

This Court's decision in *Sherbert* thus harmonizes the constitutional protection of religious freedom with the international standard, which establishes that all manifestations of religious beliefs are initially assumed valid, and are protected, until proved otherwise.[8]

In light of the above, this Court should analyze Worley's claim under the *Sherbert* and ICCPR standards.

(2) THE STATE COURT BELOW FAILED TO ADDRESS WHETHER WORLEY ENJOYS A CONSTITUTIONAL RIGHT TO CONSCIENTIOUS OBJECTION, AND THUS ERRONEOUSLY DISMISSED HIS EQUAL PROTECTION CLAIM.

"The function of equal protection is simply to measure the validity of classifications created by state laws." *San Antonio Ind. School Distr. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring). In effect, the Court has held that the Fourteenth Amendment serves to ensure that

---

[8] "If religious liberty is to have genuine practical meaning in the cases that count, [a] heightened requirement for any legislation (or other state action) that encroaches on religious liberty is vital." W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in *Religious Human Rights in Global Perspective: Legal Perspectives*, van der Vyver and Witte, eds., p.34, Martinus Nijhoff (1996).

states will treat all persons similarly situated in a similar manner. *Plyler v. Doe, 457 U.S. 202, 216 (1982).*

Worley argues that heightened scrutiny of the statute is required because it substantially burdens a fundamental liberty, the free exercise of religion, by penalizing him and his class, but not others, for having exercised his freedom of religion. *Rodriguez,* 411 U.S. at 33-34.

On its face, the Pennsylvania state Employees' Retirement law establishes the following classification scheme: (1) those who 'successfully' performed military service, and (2) those who did not. 689 A.2d at 339, App. A1.

(1) Classification System as Applied by the Retirement Board

There is compelling evidence that the application of the law expands the classification scheme, with religiously discriminatory results. The Court thus is required to look beyond facial neutrality to the effects of the law in its application. Facial neutrality is not determinative.

"The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality ... and 'covert suppression of particular religious beliefs.'" *Church of the Lukumi,* 508 U.S. at 534, *quoting Gillette v. U.S.,* 401 U.S. 437, 452 (1971), and *Bowen v. Roy,*

476 U.S. 693, 703 (1986).

Worley, a Quaker, holds well-documented religious beliefs that proscribe the performance of military service. The Selective Service System correctly recognized this, assigning him to Class I-0.[9]

Conscientious objectors of other faith groups and beliefs, whose doctrines permit the performance of military service in a non-combatant status, are assigned to Class I-A-0. These individuals are eligible under the same state law to purchase retirement credits based on the performance of military service.

The Retirement Board thus establishes the following classes: (1) conscripted individuals whose religious beliefs proscribe combatant military service, and (2) conscripted individuals whose religious beliefs proscribe all forms of military service.

(2) Summary of the Classification System as

---

[9] Selective Service regulations provide for two distinct classes of conscientious objectors:
(1) Class I-A-0, any registrant who has been found, by reason of religious, ethical or moral belief, to be conscientiously opposed to participation in combatant military training and service in the Armed Forces, and (2) Class I-0, any registrant conscientiously opposed to participation in war in any form and conscientiously opposed to participation in both combatant and noncombatant training and service in the Armed Forces. 32 CFR § 1636.3 and 1636.4.

Applied

The application of the state law by the Retirement Board denies to a readily identifiable class of public employees—conscripted conscientious objectors whose religious beliefs prohibit their participation in the military—the option to purchase retirement credits.

The same option is provided to a class of public employees similarly situated—conscripted conscientious objectors whose beliefs permit them to perform non-combatant military service. Also eligible for these public benefits are non-conscientious objectors who performed military service.

Such classification is not based solely on whether one has or has not performed military service, or whether one is or is not a conscientious objector, as a facial reading of the statute might imply. Rather, the line falls on whether one is a member of a particular religious faith or holds particular religious beliefs.

Only individuals of those religious faiths that proscribe military service in any form are denied the option of purchasing retirement credit. Absent their religious beliefs, those individuals conscripted, like Worley, would qualify for the benefits.[10]

---

[10] Individuals holding qualifying conscientious objector beliefs proscribing non-combatant duty are <u>ineligible</u> for entry into military service. DOD Directive 1300.6;

(3) Fundamental Constitutional Liberty

In determining whether the classification burdens a class's fundamental right, a court must ask whether the right "is explicitly or implicitly guaranteed by the Constitution." *Rodriguez,* 411 U.S. at 33-34. The First Amendment protects the free exercise of religion, a fundamental liberty. For Worley and others in his class, conscientious objection to war is a core religious belief, and refusal of compulsory military service is therefore an exercise of religion.

The question of whether conscientious objection is a fundamental constitutional liberty is central to Worley's Equal Protection claim and needs to be addressed. The recognition by this Court of conscientious objection as a fundamental liberty would require strict scrutiny.

This question has not been definitively answered by this Court.[11] Language such as "[w]e note that the Court has previously suggested that relief for conscientious objectors is not mandated by the Constitution" is characteristic. *Gillette,* 401 U.S. at 461. In *Gillette,* the Court

---

32 CFR, part 75.

[11] *See generally* Brown, Kohn & Kohn, *Conscientious Objection: A Constitutional Right,* New England Law Review, Vol. 21, No. 3 (1985-86).

sidesteps the question, saying

> [w]e are not faced with the question whether the Free Exercise Clause itself would require exemption of any class other than objectors to particular wars. 401 U.S. at 461.

Justice Douglas, in his dissent in *Gillette*, forcefully posed the fundamental constitutional issue: Can an individual, whose core religious beliefs forbid the taking of human life, be required by the government to kill? *Id.* at 464.

Other legal scholars argue that the recognition of conscientious objection as a constitutional right is forthcoming.[12] Boding well for this prediction is the fact that First Amendment protections for conscientious objectors have improved markedly in our nation's history.[13] Justice Douglas wrote in 1946 that

> [t]hroughout the ages men have suffered death rather than subordinate their

---

[12] *See generally* Michael P. Seng, *Conscientious Objection: Will the United States Accommodate those Who Reject Violence as a Means of Dispute Resolution?*, 23 Seton Hall L. Rev. 121 (1992).

[13] *See generally*, Michael S. Satow, *Conscientious Objectors: Their Status, the Law and its Development*, 3 Geo. Mason U. Civ. Rts. L.J. 113 (1992).

> allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. *Girouard v. United States* 328 U.S. 61, 68 (1946).

The Supreme Court of Nebraska stated that

> [w]hile the defendant's attitude toward bearing arms in war may be abhorrent to some citizens, the law must and does extend its protection to conscientious objectors. (emphasis added) *Nebraska v. Shonkwiler,* 187 Neb. 747, 752 (1972).

Conscientious objection is for Worley, a Quaker, a core religious belief, a central and non-negotiable tenet of his faith in God. Religious belief is guaranteed by the Free Exercise Clause of the First Amendment. The Free Exercise Clause also protects religiously motivated conduct. Limitations on religious conduct have been confined to those instances where such conduct posed a significant threat to public safety, peace or order. *Reynolds v. United States,* 98 U.S. 145 (1878); *Prince v. Massachusetts,* 321 U.S. 158 (1944), *Cleveland v. United States,* 329 U.S. 14 (1946); *Wisconsin v. Yoder,* 406 U.S. 205 (1972). Worley's exercise of his right of conscientious objection poses no such threat to the state.

This is the case in which the Court should finally recognize that conscientious objection to war as a form of free exercise

of religion is a fundamental constitutional liberty.

(4) International Law Standards

This Court can find authority for the recognition of conscientious objection as a fundamental constitutional liberty in international law. Conscientious objection is recognized, deriving from Article 18 of the International Covenant on Civil and Political Rights (ICCPR), as a universal human right by the United Nations Human Rights Committee.[14] The United Nations actively promotes conscientious objection.[15] The United States

---

[14] "...[A] right of conscientious objection to military service can be derived from Article 18 [of the ICCPR] inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest religious or other beliefs." General Comment 22, *Article 18*, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

[15] "Other allegations raise the problem of the absence of legal recognition of the right of conscientious objection ... or even of legal provisions recognizing the concept of conscientious objection ... an omission at variance with international law." (emphasis added) Secretary-General of the United Nations, *Note by the Secretary-General, Implementation of the Declaration on the Elimination of All Forms of Religious Intolerance and Discrimination Based on Religion or Belief*, U.N. Doc. A/51/542,

government in 1993 and 1995 sponsored United Nations Human Rights Commission resolutions recognizing conscientious objection as a universal human right.[16]

(5) Required Standard of Judicial Review

When a statute substantially burdens a class of persons because of their exercise of a fundamental right, the governmental classification must be subjected to heightened scrutiny.

This Court struck down a veterans preference law as inhibiting a constitutionally protected right to travel.

> If there are other, reasonable ways to achieve [the state purpose] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 909-910 (1986), *quoting Dunn v. Blumstein*, 405 U.S. 330, 343 (1972), *Hooper et al v. Bernalillo County Assessor, 472 U.S. 612 (1985)*.

The court below, while recognizing the preferential nature of the state law,

---

General Assembly, Fifty-First Session, Agenda Item 110 (b) (1996).

[16] "*Conscientious Objection,*" U.N. Doc. E/CN.4/1993/122, and "*Conscientious Objection,*" U.N. Doc. E/CN.4/1995/176.

dismissed the appellant's Equal Protection claim, arguing that

> ...the [fact that the] General Assembly elected to reward members who have had military service by permitting them to purchase additional retirement credit clearly is not irrational. Presumably, the General Assembly has determined that those members have sacrificed their time and served their country in a particular fashion which warrants special consideration. 689 A.2d at 339; *see* App. A.1

The court did not analyze the fundamental liberty issued raised by Worley, and thus reached the precipitous and ill-advised conclusion that Worley's Equal Protection claim fails.

(3) THE STATE HAS NO SUFFICIENT INTEREST THAT PREVENTS IT FROM GRANTING WORLEY AND OTHER MEMBERS OF HIS CLASS PUBLIC BENEFITS.

In *Johnson v. Robison,* this Court held that Congress had a rational basis for excluding conscientious objectors from the receipt of educational benefits provided for military service veterans. 415 U.S. 361.

The Court held that "[t]he statutory classification also bears a rational relationship to the Act's objective of making military service more attractive," and that the inclusion of conscientious objectors

"would not rationally promote the Act's purposes." 415 U.S. at 382.

Neither the Pennsylvania General Assembly nor the court below states what the objective of the statute is. The court notes that

> [a]s stated in Morris, credit for military service in PSERS is a benefit which the Commonwealth need not offer. Therefore, the General Assembly's restriction of that benefit to active military service is clearly not irrational. 689 A.2d at 330.

This conclusion is nothing more than a *non-sequitur*.

The court imputes the statute's objective in *Morris*, adding

> [i]t is certainly a legitimate state interest to limit that benefit to individuals who could not otherwise receive a benefit for their military service. 538 A.2d at 1390.

The objective then is only to benefit those who performed military service.

Again, this is illogical. Both classes in *Morris* were veterans. The issue was the permissibility of restricting benefits to the subgroup with the apparent greater unmet need. No such rationale applies here.

The desire of Pennsylvania to supplement the federal government's already generous array of special benefits for veterans does not by itself run afoul of the

Constitution. But is it a compelling state interest, or even a rational one, when viewed in light of the Equal Protection clause? The answer is "no."

Pennsylvania also might invoke some of the governmental interests described by this Court in *Johnson*. In *Johnson*, this Court found the purpose of the Veterans Readjustment Act to include, in addition to providing educational opportunities to those who might otherwise not have them, the desire to make military service more attractive and, principally, to assist military personnel in readjusting to civilian life. 415 U.S. 361.

Yet the Pennsylvania state law does not have the objective of making military service more attractive. The provision likely could not have any bearing on a person's decision whether or not to enlist voluntarily in the armed forces. Nor could the provision conceivably influence a conscript's decision about whether to perform military or alternative service.

Second, the state law does not function in any way to assist armed forces veterans in readjusting to civilian life. The benefits provided by the statute are limited to public school employees, serve only to compensate for time spent in the armed forces, and are obtained at the time of retirement. Thus the statute bears no relationship to the veteran's immediate post-military life.

Other cases involving veteran's preferences in employment demonstrate that no

compelling interest exists. In *Brickhouse v. Spring-Ford Area School District*, 656 A.2d 483 (1995), the Supreme Court of Pennsylvania reversed a lower court's finding that the Veteran's Preference Act mandated the hiring of a military veteran.

The Supreme Court of Montana held that a state law giving hiring preferences to veterans, their family members and disabled non-veterans constituted an affirmative action program that did not violate the Equal Protection clause of the Constitution as being gender discriminatory. *Crabtree v. Montana State Library*, 204 Mon. 398 (1983).

In *Nick v. Montana Dept. of* Highways, 219 Mont. 168 (1985), the Montana court held that veteran's preferences do not confer a constitutionally protected property right. In *Fleming v. Montana State University*, 220 Mont. 133 (1986), the same court held that the repeal of veteran's preferences did not constitute a violation of Equal Protection.

Such preferences, while constitutional, further no sufficient state interest to warrant substantial burdens on religious exercise.

This case is also readily distinguishable from *Mass. Personnel Admin. v. Feeney*, 442 U.S. 256 (1979), where the failed equal protection challenge to a state's civil service veterans preference focuses solely on a predictable but unintended disparate impact, and not on any declassification actually drawn by the

legislation itself.

Denying Worley and other members of his class benefits bears no significant relationship to a sufficient state interest. No economic loss would be inflicted on the state by providing Worley the benefits.

Heightened scrutiny of the statute is warranted because, absent the religious beliefs which prohibited him from performing military service, he would have qualified for the public benefits in question.

CONCLUSION

For the foregoing reasons, petitioner Daniel T. Worley prays that this Court grant his petition for a Writ of Certiorari. After full review, the judgment of the Pennsylvania Commonwealth Court should be reversed and the case remanded with direction in turn to the Retirement Board for entry of an order allowing petitioner to purchase two additional years of retirement credit.

Respectfully submitted,

By: FRANCIS WORLEY
Attorney for Petitioner
2 March 1998

Appendix A.

Daniel T. WORLEY, Petitioner,

v.

PENNSYLVANIA PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD, Respondent.

Commonwealth Court of Pennsylvania.

Argued Dec. 9, 1996.

Decided Jan. 31, 1997.

(689 A.2d 334)

School employee's request to purchase retirement credit for non-school service was denied by the Public School Employees' Retirement Board, No. 1994-19, and employee appealed. The Commonwealth Court, No. 2009 C.D. 1996, Kelley, J., held that: (1) conscientious objector's civilian work performed in lieu of induction into the armed forces did not constitute "military service" within provision of public school employees' retirement code allowing purchase of credit for military service; (2) denial did not violate due process or equal protection; (3) denial did not violate right to worship; (4)

denial did not violate state constitutional provision that the General Assembly may exempt from state military service persons having conscientious scruples against bearing arms; and (5) denial did not impair obligation of contract.

Affirmed.

***335** Francis Worley, York Springs, for petitioner.

Michael J. Luparello, Harrisburg, for respondent.

Before McGINLEY and KELLEY, JJ., and NARICK, Senior Judge.

KELLEY, Judge.

Daniel T. Worley (Worley) appeals from an order of the Pennsylvania Public School Employees' Retirement Board (board) denying Worley's request to purchase credit for non-school service pursuant to section 8304 of the Public School Employees' Retirement Code (Retirement Code). [FN1] We affirm.

FN1. 24 Pa.C.S. § 8304(b)(2). Section 8304 of the Retirement Code permits, subject to certain exceptions not applicable herein, an active member of the State Employees'

Retirement System to receive service credit for creditable non-school service as set forth in subsection (b). 24 Pa.C.S. § 8304. Section 8304(b)(2) provides as follows:

> (b) Limitations on non-school service.--Creditable non-school service credit shall be limited to:
>
> (2) Military service other than intervening military service and activated military service not exceeding five years provided that a member with multiple service may not purchase more than a total of five years of military service in both the system and the State Employees' Retirement System.

Section 8102 of the Retirement Code defines military service as "[a]ll active military service for which a member has received a discharge other than an undesirable, bad conduct or dishonorable discharge." 24 Pa.C.S. § 8102.

Board regulations governing creditable non-school service state, in pertinent part, that "[a]n active member may purchase other military service ... for service rendered only to the armed forces of the United States before the member commenced his most recent school employment." 22 Pa.Code § 213.4(d).

I. FACTS

In 1968 Worley received notice from the Selective Service System that he was subject to induction in the Armed Forces of the United States. At that time, Worley was a member of the Quaker faith; therefore, Worley sought classification as a conscientious objector. On November 19, 1968, Worley was issued a notice of classification from the Selective Service System which indicated that he was classified in Class I-O. The Class I-O classification was defined as a "Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest." Reproduced Record (R.) at 52a.

By notice dated February 20, 1969, Worley was ordered to report for an Armed Forces Physical Examination. With respect to Class ***336** I-O registrants, the notice specified as follows:

> This examination is given for the purpose of determining whether you are qualified for military service. If you are found qualified, you will be available, in lieu of induction, to be ordered to perform civilian work contributing to the maintenance of the national health, safety or interest. If you fail to report for or to submit to this examination, you will be subject to be ordered to perform civilian work in the same manner as if you had taken the examination and had been found qualified for military service.

R. at 53a.

With respect to registrants classified in the Class I-A [FN2] and I-A-O [FN3] classifications, the notice to report for the Armed Forces Physical Examination provided as follows:

> FN2. Class I-A was defined by the Selective Service as "Registrant available for military service." R. at 52a.
>
> FN3. Class I-A-O was defined by the Selective Service as "Conscientious objector registrant available for noncombatant military service only." R. at 52a.

> If you fail to report for examination as directed, you may be declared delinquent and ordered to report for induction into the Armed Forces. You will also be subject to fine and imprisonment under the provisions of the Universal Military Training and Service Act, as amended.
>
> Id.

Worley was provided with a list of acceptable civilian employers for whom he could perform his civilian work. Worley chose to perform his civilian work for Jefferson Medical Center in Philadelphia. Worley worked for Jefferson Medical Center from July 1, 1969 through June 30, 1971. On July 2, 1971, Worley received

from the Selective Service a release from the performance of civilian work contributing to the national health, safety or interest effective June 30, 1971. The release stated that Worley was released for the following reason: "Satisfactory completion of period of appropriate civilian work in lieu of induction into the armed forces." R. at 59a.

On October 26, 1973, Worley was employed by the Northern York School District and became a member of the Public School Employees' Retirement System of Pennsylvania (PSERS). On November 3, 1994, Worley appeared before the appeals committee of the board and requested that he be permitted to purchase military retirement credit for the two years in which he performed alternate service. By letter dated November 14, 1994, the appeals committee denied Worley's request to purchase military service credit on the basis that the alternate service did not meet the definition of military service as provided in the Retirement Code.

Worley requested an administrative hearing which was held on June 29, 1995. Thereafter, the hearing examiner issued a decision and order recommending that Worley's request to purchase retirement credit for the alternate civilian work be denied. The hearing examiner determined that Worley failed to establish that the board misinterpreted or misapplied the provisions of section 8304(b) of the

Retirement Code when it denied Worley's request to purchase retirement credit for the civilian work he performed from July 1, 1969 to June 30, 1971.

The hearing examiner concluded that Worley's civilian work performed in lieu of induction into the armed forces, did not constitute military service. The hearing examiner stated that Worley's testimony and the documents he introduced into evidence are replete with characterizations of his work as "alternate", "civilian" and "in lieu of induction into the armed forces." When this terminology expressly characterized Worley's work as other than military in nature, the hearing examiner opined, it was simply impossible to conclude that Worley's work constituted military service. In addition, the hearing examiner determined that Worley failed to establish that section 8304(b) of the Retirement Code and any related provisions are unconstitutional under either the United States or the Pennsylvania Constitutions.

Worley filed exceptions to the hearing examiner's decision. The board adopted the hearing examiner's findings of fact, discussion, conclusions of law and recommendation ***337** in their entirety and adopted them as its own. Consequently, the board determined that Worley's exceptions were without merit and found that Worley's civilian service did not constitute military service as

that term is defined in section 8102 of the Retirement Code; therefore, Worley's civilian service was not creditable non-school service within the meaning of section 8304 of the Code.

[1] Accordingly, the board entered an order denying Worley's request for credit for his civilian service performed at the Jefferson Medical Center. This appeal followed. [FN4]

> FN4. This court's scope of review is limited to determining whether the findings of fact were supported by substantial evidence, errors of law were committed or constitutional rights were violated. Estate of McGovern v. State Employees' Retirement Board, 512 Pa. 377, 517 A.2d 523 (1986).

II. ISSUES

On appeal herein, Worley raises the following issues: (1) Whether the board committed fundamental error by denying Worley's application to purchase creditable non-school service for two years alternate military duty performed by Selective Service direction at a mental institution, by misconstruing the Retirement Code which neither expressly or impliedly excludes credit for such service; and (2) Whether the board committed a deliberate unconstitutional application of the

Retirement Code, thereby violating Worley's constitutional due process, equal protection and non-impairment of contract rights under the United States and Pennsylvania Constitutions, in derogation of the separation of powers doctrine.

III. DISCUSSION

A. ISSUE I--CONSTRUCTION OF RETIREMENT CODE

[2] In support of the first issue raised on appeal herein, Worley argues that the Retirement Code nowhere expressly or impliedly precludes the purchase of alternative military service of the type performed by Worley. Worley contends that the board has not interpreted the Retirement Code liberally as required by case law and that the board erred in giving no weight to the legislative history of the Retirement Code, which is silent on the issue of whether military service is restricted to uniformed duty.

[3][4] We disagree that the board has erred by misconstruing the plain language of the Retirement Code. [FN5] It is undisputed that an active member of PSERS may purchase, subject to certain exceptions not applicable herein, credit for military service as creditable non-school service under section 8304 of the Retirement Code. [FN6] As previously noted in this opinion, section 8102

of the Retirement Code defines military service as "[a]ll active military service for which a member has received a discharge other than an undesirable, bad conduct, or dishonorable discharge." 24 Pa.C.S. § 8102. The regulations governing creditable non-school service provide that an active member may purchase military service for service rendered only to the armed forces of the United States. 22 Pa.Code § 213.4(d).

FN5. Words and phrases used in a statute are to be construed according to the common meaning and accepted usage. See section 1903 of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1903. The board is charged with the execution and application of the Retirement Code; as such, its interpretation should not be overturned unless it is clear that such construction is erroneous. Panko v. Commonwealth, Public School Employees' Retirement System, 89 Pa.Cmwlth. 419, 492 A.2d 805 (1985).

FN6. We note that this court has held that section 8304(b) of the Retirement Code is a limiting provision. See Panko.

The record supports the conclusion that the service which Worley is requesting to purchase as creditable non-school service is not military service as that term is defined and

utilized in the Retirement Code and accompanying regulations. Worley was not inducted into the armed forces of the United States and did not receive a discharge from active military service. To the contrary, Worley, of his own choosing, performed and satisfactorily completed civilian service in lieu of induction into the armed forces as a Class I-O registrant. See R. at 59a (Release from performance of civilian work). To acknowledge Worley's completion of the civilian work, Worley received a release from the ***338** executive secretary of the local selective service board which clearly states that Worley was issued the release for "[s]atisfactory completion of period of appropriate civilian work in lieu of induction into the armed forces." Id.

In addition, the definition of the Class I-O classification provided by the Selective Service defines a registrant of Class I-O as a "[c]onscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest." See R. at 52a (emphasis added). The record shows that, as a Class I-O registrant, Worley was permitted to choose which civilian employer he wished to work with in order to fulfill his obligation under the civilian work program. The order issued to Worley by the Selective Service to report for an Armed Forces Physical Examination notified each Class I-O registrant that failure to appear for the physical examination would result in

the registrant being ordered to perform civilian work. In contrast, the order to report for an Armed Forces Physical Examination notified each Class I-A and I-A-O registrant that failure to appear would result in the registrant being ordered to report for induction in the Armed Forces and further, that the registrant would be subject to fine and imprisonment. Accordingly, the difference in the sanctions imposed for failure to appear for a registrant in the different classifications further supports the conclusion that the service performed by Worley was strictly civilian in nature and that he was never inducted into the armed forces of the United States.

Next, Worley contends that the board erred in giving no weight to the legislative history of the Retirement Code, which is silent on the issue of whether military service is restricted to uniformed duty. We disagree.

[5] We believe that the language of the Retirement Code is clear. In order for a member of PSERS to be eligible to purchase prior military service as creditable non-school service, such service must be active military service in the armed forces of the United States for which the member received a discharge. When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. Section 1921

of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1921.

Since the language of the Retirement Code is clear, the fact that the legislative history of the Retirement Code is silent on the issue of whether military service is restricted to uniformed duty actually supports the board's interpretation of the Retirement Code. While it may appear to Worley that the board's interpretation of the Retirement Code is unfair to his particular situation, in light of the provisions of the Retirement Code, the remedy for such does not lie with this court but with the General Assembly. See Frost v. Metropolitan Life Insurance Company, 337 Pa. 537, 12 A.2d 309 (1940) (The hardship or equity of a case cannot override the plain words of a statute, and the General Assembly, not the court, must correct the evil).

B. ISSUE II--CONSTITUTIONALITY OF SECTION 8304(B)

Worley argues that the board committed a deliberate unconstitutional application of the Retirement Code when it denied his request resulting in a violation of Worley's due process, equal protection and non-impairment of contract rights under the United States and Pennsylvania Constitutions.

[6][7] All legislation enacted by the General

Assembly carries a strong presumption of constitutionality, and any party challenging the statute's constitutionality bears a heavy burden to demonstrate that the legislation clearly, palpably, and plainly violates the terms of the constitution. Commonwealth v. Burnsworth, 543 Pa. 18, 669 A.2d 883 (1995). It is presumed in construing a statute that the General Assembly did not intend to violate the State or Federal Constitutions. Baumgardner Oil Co. v. Commonwealth, 146 Pa.Cmwlth. 530, 606 A.2d 617, petition for allowance of appeal denied, 531 Pa. 648, 612 A.2d 986 (1992).

1. UNITED STATES CONSTITUTION

[8] Worley contends that the board improperly concluded that his due process and ***339** equal protection rights have not been violated.

This court has previously addressed the issue of whether section 8304(a) of the Retirement Code violated a petitioner's substantive due process and equal protection rights under the Fourteenth Amendment of the United States Constitution. In Morris v. Commonwealth, Public School Employees' Retirement System, 114 Pa.Cmwlth. 369, 538 A.2d 1385, 1389 (1988), petition for allowance of appeal denied, 521 Pa. 615, 557 A.2d 345 (1989), this court, in rejecting the petitioner's arguments that section 8304(a) violated the Fourteenth Amendment of the United States Constitution,

stated that:

> "Absent an infringement of a 'fundamental right' or the use of a 'suspect classification,' the rational basis test is the proper standard of review for both substantive due process and equal protection challenges to governmental action." ... [T]he rational basis test is the proper test to be applied to ... due process and equal protection claims.... The focus of the rational basis test for substantive due process is whether it was irrational for the law to have been passed at all, while the focus for equal protection is whether the law irrationally distinguishes between similarly situated classes.... To prove that a statute is irrational and, therefore unconstitutional, the challenger must show for substantive due process purposes that there is no relationship between the statute and a legitimate state interest ... and for equal protection purposes, that the different treatment of the groups is unrelated to a legitimate state interest. (Citations omitted.)

In Morris, the petitioner sought to purchase prior military service. However, the board found that petitioner was currently eligible to receive a retirement benefit from the federal government for the prior military service. Therefore, he was ineligible to purchase credit for said military service under section 8304(a) of the Retirement Code.

[FN7] This court affirmed the board's decision.

> FN7. Section 8304(a) provides that an active member of PSERS "shall be eligible to receive ... service credit for creditable non-school service as set forth in subsection (b) provided that he is not entitled to receive, eligible to receive now or in the future, or is receiving retirement benefits for such service under a retirement system administered and wholly or partially paid for by any other governmental agency or by an private employer...." 24 Pa.C.S. § 8304(a).

With respect to the constitutionality of section 8304(a), this court pointed out that the intention of the General Assembly in enacting the restriction on eligibility for creditable non-school service is " 'to prevent individuals from receiving credit in two retirement systems for the same service.' " Morris, 538 A.2d at 1389, quoting Barcus v. Commonwealth, State Employees' Retirement Board, 76 Pa.Cmwlth. 62, 463 A.2d 490, 491 (1983). We held that "[b]ecause credit for military service in the System is a benefit which the Commonwealth need not offer, it is certainly a legitimate state interest to limit that benefit to individuals who could not otherwise receive a benefit for their military service. Id., 538 A.2d at 1390. Therefore,

it was not irrational for the General Assembly to have enacted the restriction and the restriction is not violative of any substantive due process right Petitioner might have." Id.

In addition, this court held that section 8304(a) did not violate the equal protection clause even though there may have been another means by which the General Assembly could have implemented the legitimate state purpose of preventing the receipt of double benefits for the same military service. Id. We pointed out that the equal protection clause is not violated merely because the classification is imperfect. Id. Quoting the United States Supreme Court in Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970), we stated:

> If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." ... The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific.... "A statutory discrimination will not be set aside if ***340** any state of facts reasonably may be conceived to justify it." (Citations omitted.)

Id.

In the present case, Worley does not even attempt to show, for substantive due process purposes, that there is no relationship between the Retirement Code and a legitimate state interest and, for equal protection purposes, that the different treatment of the groups is unrelated to a legitimate state interest. Worley merely sets forth in the argument portion of his brief in short paragraph form, alleged errors of law committed by the board without elaboration. Notwithstanding this, we believe that this court's decision in Morris defeats any claim by Worley that section 8304(b) is violative of the Fourteenth Amendment of the United States Constitution.

Section 8304(b) is a limiting provision which sets forth the types of creditable non-school service credit for which an active member of PSERS shall be eligible to receive service credit pursuant to section 8304(a). Panko. As stated in Morris, credit for military service in PSERS is a benefit which the Commonwealth need not offer. Therefore, the General Assembly's restriction of that benefit to active military service is clearly not irrational. As stated, Worley fails to argue how the statutory scheme permitting the purchase of military service is irrational. Accordingly, the restriction is not violative of any substantive due process right Worley claims he may have.

We also reject Worley's contention that section 8304(b) violates his equal protection rights. Worley appears to argue that the two classes of individuals being treated differently by section 8304(b) are those who provide uniformed military service and those who provide alternative military service. As pointed out by the board, the flaw in Worley's contention is that he is not a member of the class which he claims is being discriminated against because he has not provided military service. As the record herein reveals, Worley did not perform military service within the meaning of the Retirement Code but rather performed civilian work as an alternate to military service. This choice not to be inducted into the armed forces and perform active military service was made by Worley based on his religious beliefs. Therefore, Worley is a member of the class of people who have not served in the armed forces of the United States. Because Worley has not served in the military for which he received a discharge, he is not eligible to receive service credit for military service as provided for in section 8304(b) of the Retirement Code.

While Worley's performance of civilian work in lieu of induction into the armed forces may deserve special consideration, the exclusion of that class from section 8304(b) of the Retirement Code does not result in a constitutional violation. If a classification has some reasonable basis, it does not offend

the Constitution simply because in practice it results in some inequality. Morris. As correctly stated by the board, that the General Assembly elected to reward members who have had military service by permitting them to purchase additional retirement credit clearly is not irrational. Presumably, the General Assembly has determined that those members have sacrificed their time and served their country in a particular fashion which warrants special consideration. Therefore, we decline to set aside any statutory discrimination that may arise from the General Assembly's choice not to include those individuals who choose to perform civilian work in lieu of induction into the armed forces because it appears to result in some inequality.

Accordingly, we reject Worley's contentions that section 8304(b) of the Retirement Code violates the Fourteenth Amendment of the United States Constitution.

2. PENNSYLVANIA CONSTITUTION

Next, Worley contends, again without elaboration, that the board's denial of his request to purchase alternative military service violates the Pennsylvania Constitution, specifically: Art. I, § 3; Art. I, § 26; Art. III, § 16; and Art. I, § 17. We will address the alleged violation of each article separately.

a. ARTICLE I, SECTION 3

[9] Art. I, § 3 of the Pennsylvania Constitution provides that:

> ***341** All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

Worley contends that the board erred in finding no violation of Art. I, § 3 because the board's decision deliberately discriminates against a class of citizens who lawfully pursue a religious scruple against war. We disagree.

As correctly pointed out by the board, section 8304 of the Retirement Code neither explicitly or implicitly prohibits Worley in any manner from worshiping as he chooses or from enjoying freedom of conscience. As the record shows herein, Worley exercised his constitutional right to follow his conscience and his religion and refuse military service. To now argue that it is an infringement on such constitutional rights to deny him service credit which accrues only for military service

is nonsensical. Accordingly, we decline to find a violation of Worley's rights pursuant to Art. I, § 3 of the Pennsylvania Constitution.

b. ARTICLE I, SECTION 26

Art. I, § 26 of the Pennsylvania Constitution provides that "[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." The board determined that Worley's allegation of a violation of this constitutional provision lacked specificity and that Worley did not identify which civil right he believed was infringed upon by the denial of his request to purchase military service. In short, the board determined that Worley failed to substantiate this claim.

Herein, Worley merely states in his brief, without further discussion, that civil rights are properly defined to prohibit any deprivation of due process, equal protection and freedom from interference with economic rights. We have already held that Worley's due process and equal protection rights have not been violated under the United States Constitution. Therefore, without an argument by Worley as to how these rights have been violated under the Pennsylvania Constitution, we reject his claim that the board violated his rights under Art. I, § 26 of the

Pennsylvania Constitution based on our previous discussion with respect to the Fourteenth Amendment of the United States Constitution.

c. ARTICLE III, SECTION 16

[10] Art. III, § 16 of the Pennsylvania Constitution provides that the General Assembly "may exempt from State military service persons having conscientious scruples against bearing arms."

Worley contends that the board has mistakenly concluded that its decision did not violate the policy inherent in Art. III, § 16 as to protection for citizens having scruples against bearing arms. The board determined that nothing in the record suggests how the policy inherent in Art. III, § 16 could have been violated.

We agree with the board's reasoning that Worley was afforded the opportunity to be exempted from military service and he availed himself of that opportunity. The board correctly stated that the Commonwealth's subsequent offer of the opportunity to purchase retirement credit for military service in no way undermines this policy. Accordingly, we decline to hold that Worley's rights under Art. III, § 16 of the Pennsylvania Constitution have been violated

by the board's order and decision.

d. ARTICLE I, SECTION 17

[11] Finally, Worley argues that once he became a member of PSERS, he entered into a contract which may not be impaired and that the board erred by omitting from its order reference to its impairment of contract violation against Worley under Art. I, § 17 of ***342** the Pennsylvania Constitution. [FN8] We disagree.

> FN8. Art. I, § 17 of the Pennsylvania Constitution provides that no law shall be passed impairing the obligation of contracts.

We believe that the board properly found, based on the record herein, that Worley has failed to establish the existence of any contractual right to purchase retirement credit for military service. Moreover, Worley offers no support herein for his contentions. Worley does not provide any statutory authority which mandates that the board provide him with retirement credit for civilian work as a conscientious objector. Accordingly, we decline to hold that the board's order denying Worley's request to purchase service credit violates Art. I, § 17 of the Pennsylvania Constitution.

The board's order is affirmed.

ORDER

NOW, this 31st day of January, 1997, the order of the Public School Employees' Retirement Board, dated June 21, 1996, at No. 1994-19, is affirmed.

Appendix B

Daniel T. Worley

v.

Pennsylvania Public School Employees' Retirement Board

NO. 0148 M.D.ALLOC. (1997)

701 A.2d 580

Supreme Court of Pennsylvania

Oct 17, 1997

Pa.Cmwlth., 689 A.2d 334

Appeal from the Commonwealth Court.

Disposition: Denied.

(The decision of the Court is referenced in the Atlantic Reporter in a table captioned "Supreme Court of Pennsylvania Disposition of Petitions for Allowance of Appeal.")

Appendix C

Daniel T. Worley

v.

Pennsylvania Public School Employees' Retirement Board

No. 0148 M.D. Allocatur Docket 1997

Supreme Court of Pennsylvania

1997 Pa. Lexis 2642

December 2, 1997, Decided

PRIOR HISTORY: Original Opinion of January 31, 1997, Reported at: 1997 Pa. Commw. LEXIS 45.

OPINION: Petition for Reconsideration from the Order of the Commonwealth Court

ORDER

PER CURIAM:

AND NOW, this 2nd day of December, 1997, the Petition for Reconsideration is hereby DENIED.

Appendix D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DANIEL T. WORLEY	:	
Appellant	:	
	:	
v.	:	No. 2009 C.D. 1996
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA PUBLIC	:	
EMPLOYEES'	:	
RETIREMENT BOARD	:	

APPELLANT'S NOTICE OF DESIGNATION OF CONTENTS OF REPRODUCED RECORD AND STATEMENT OF ISSUES PRESENTED BY APPELLANT FOR REVIEW

Pursuant to R.A.P. 2154 Appellant hereby gives notice of Appellant's designation of contents and reproduced record and brief statement of issues presented by Appellant for review:

A. DESIGNATION OF CONTENTS OF REPRODUCED RECORD

Appellant proposes to reproduce the following portions of the record:

1. Transcript of hearing before Board on June 29, 1995.

2. Applications of Appellant for enrollment in Public School Employee's Retirement System dated 10/26/73 and

9/2/75.

3. Record exhibits pertaining to Appellant's drafting, service and release from service: Selective service letters Local Board No. 1 dated 11-13-68, 11-19-68, 2-20-69, 3-12-69 (Statement of Acceptability, 4-22-69, 6-11-71 and 7-2-71. (Exhibits to Appellant's hearing brief and second Appellant's hearing brief).

4. Appellant's letter of 11-28-94, to Board Deputy Chief Counsel and attachments (Appellant's hearing brief).

B. STATEMENT OF APPLICANT'S ISSUES

1. HAS THE PUBLIC SCHOOL EMPLOYEE'S RETIREMENT BOARD COMMITTED FUNDAMENTAL ERROR BY DENYING APPELLANT'S APPLICATION TO PURCHASE CREDITABLE NON-SCHOOL SERVICE FOR TWO YEARS' ALTERNATIVE MILITARY DUTY PERFORMED BY SELECTIVE SERVICE DIRECTION AT A MENTAL INSTITUTION, BY MISCONSTRUING A STATUTE WHICH NEITHER EXPRESSLY OR IMPLIEDLY EXCLUDES CREDIT FOR SUCH SERVICE? (YES)

2. HAS THE BOARD IN DENYING APPELLANT'S REQUEST COMMITTED A DELIBERATE UNCONSTITUTIONAL APPLICATION OF THE STATUTE, THEREBY VIOLATING APPELLANT'S DUE PROCESS, EQUAL PROTECTION AND NON-IMPAIRMENT OF CONTRACT RIGHTS UNDER THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS, IN DEROGATION OF THE SEPARATION OF POWERS DOCTRINE? (YES)

Respectfully submitted,

Francis Worley, Esquire
Attorney I.D. No. 14913
225 Latimore Valley Rd.
York Springs, PA 17372

Counsel for
Daniel T. Worley
Appellant

I just want to give this Honorable Court a little background on how this case came before you. The director of the Legislative Reference Bureau assigned Mrs. Mitchell to see what amendments, if any, are needed. Mrs. Mitchell was a former law clerk to Judge Wilkerson when Judge Wilkerson was on this Honorable Court. Mrs. Mitchell said to me, I remember you, Francis Worley, when you came into Judge Wilkerson's office when I was his law clerk. She said I reviewed the law applicable to the Daniel T. Worley case and that the situation is already in the law to give him his alternative service rights; namely, to buy the two years towards his retirement in which he was taken into the alternative service by the United States Government. So I went back to the Public School Employee's Retirement Board, had a hearing and the Board disagreed and said that the Pennsylvania statute does not include the

alternative service in the Daniel T. Worley case, so now I come before this Honorable Court. Daniel T. Worley believes he has the right to purchase the two years in which he was taken into the alternative service by the United States government or else there are violations of both the state and federal constitutions.

I am just a little country lawyer. But this may be an important case in the future of American jurisprudence. People often have strong feelings on this kind of a case. Daniel T. Worley believes the Board has misconstrued the law and applied it in an unconstitutional way. There is sometimes a bias in favor of armed uniform service, such bias springs from a war-like attitude which springs from world wars and other conflicts. It is a blind acceptance of the superiority of the military approach to problems. For example, we talk about the war on drugs, a war-like attitude to problems. The Board is guided by this kind of application rather than a constitutional approach. The basic constitutional questions are:

(1) Usurping the power of the legislature by interpreting the law to exclude alternative service. The law on its face does not so exclude alternative service. The Statutory Construction Act of Pennsylvania requires a broad and liberal construction.

(2) The due process clause prevents Daniel T. Worley from being deprived of

vested property rights, the right to receive benefits for non-school service.

(3) There is also a lack of equal protection of the law if Daniel T. Worley cannot buy his alternative service time like others can in the armed military.

(4) There is an impairment of obligation of contract. This is a benefit under contract, a contract to be construed liberally and broadly.

(5) Article 3, Section 16, and Article 1, Section 3 of the Pennsylvania Constitution; and the First Amendment of the bill of Rights in the United States Constitution all deal with freedom of religion with respect to bearing arms.

We believe that no right rises higher than the freedom of religion and that right supports our case here today.